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DISCHARGE OF CONTRACTS

In the law of contracts there is a great deal of misunderstanding or lack of understanding in regard to certain topics connected with the subject of discharge. Some of this is due to the fact that few men use such terms as condition and warranty in the same sense. The rest is due to faulty reasoning concerning matters that are admittedly difficult. This article will not attempt to discuss the subject of discharge in all of its details, but will try to delimit the field and will discuss at some length a few of the problems arising therein. In particular, the relations existing between the subject of fulfilment of conditions and the subject of discharge, and between breach of contract and discharge, will be discussed. It is believed that great assistance will be obtained from a clear understanding and a complete separation of primary and secondary obligations.[1] Like aid will be gained from the idea that the action of *special assumpsit* was an action for damages, was always the method of enforcing a secondary obligation, while the actions of *debt* and *indebitatus assumpsit* were chiefly for the enforcement of primary obligations.

PRIMARY AND SECONDARY OBLIGATIONS DISTINGUISHED.

The formation of a contract creates an original primary obligation. Upon the breach of this primary obligation, there arises a secondary or remedial obligation to pay damages. Under some circumstances the secondary obligation wholly replaces the primary one, which is regarded as extinguished. Under other circumstances both will exist together. The common-law remedies

[1] See Holland, Jurisprudence, Ed. 10.

are generally directed to the enforcement of the secondary obligation, as in the case of the remedy in damages in express assumpsit. The equitable remedy called specific performance is intended to enforce the primary obligation; but the decree also allows incidental damages, thus enforcing the primary and the secondary obligations at the same time. The common-law remedies in debt and *indebitatus* assumpsit are for the specific enforcement of the primary obligation as in equity, also sometimes giving incidental damages by way of interest.

Ordinarily neither law nor equity will afford a remedy for the enforcement of the primary contractual obligation until a breach of it has occurred. Indeed, not even the equitable remedy secures the exact performance of the primary obligation; but it approaches so nearly to exact performance that it seems proper and convenient to say that the primary obligation is enforced. But even though it is not enforcible until after breach, the primary obligation is a tie that binds, a *vinculum juris*.

If A promises to complete certain work for B within a year for $1,000 to be paid by B, A is under an obligation at once. This is the primary contractual obligation. It is the only one that will exist as against A, until a breach is committed by A. When such a breach occurs, A will be under a new obligation to repair the damage, to put B in as good a financial position as he would have been in had A performed the contract. This is the secondary or remedial obligation. It is the *only* obligation, in a case like this, that can be enforced. Equity will not decree specific performance of a promise to perform labor, and the common law offers damages alone as a remedy. A is liable in special assumpsit only; he is not liable in debt.

If, in the above case, B has paid the money, and A fails to do any of the work, B can sue for a return of the money paid, as an alternative of suing for damages. In a suit for damages, of course, any money paid on account would be one of the elements of the damage collectible at law. But all the *other* elements may be waived, if B so desires, and he may sue merely for restitution of the money he has paid. This remedy is generally referred to as quasi-contractual, but it is not truly so, unless all secondary obligations are quasi-contractual. It is in fact *secondary* in character, arising out of a breach of an antecedent primary obligation, and created by the law independently of the consent of the parties.

The obligation of B to pay the $1,000 is a primary obligation, just as A's obligation to do the work was primary. No action will lie to enforce B's obligation to pay until after he has committed a breach of it, until the time for payment has arrived. After such a breach, B too comes under a secondary obligation to pay damages. In this case, however, B's original primary obligation is of such a character that it can be specifically enforced. The common law afforded such a remedy in the action of debt, and therefore equity did not need to intervene. Strictly and historically, the action of debt was for the sum due and was not for damages. But the practical distinctions between debt and assumpsit have been vanishing for more than three centuries, and no doubt in debt the judgment will be for interest as damages in addition to the sum due. Besides this specific enforcement of B's primary obligation in the action of debt, his secondary obligation to pay damages is enforcible in special assumpsit, and the amount of the debt due and unpaid is the largest element to be included.

CONDITIONS PRECEDENT.

All those things that are necessary to the *formation* of a valid contract are *conditions precedent to the existence of the primary obligation.* They are not conditions *in* the contract and are not terms thereof, but are precedent to its existence. Any one alleging a contract and asking a remedy thereon must bear the burden of proving the fulfilment of these conditions. He must prove the formation of a valid contract, the existence of a primary obligation. But he has still more to prove. He is asking a remedy. He must show the existence of the secondary, remedial obligation. This secondary obligation does not arise until breach of the primary obligation by the defendant. The contract may itself provide that certain facts must exist or events take place before the defendant's performance is due. Such provisions are conditions in the contract, terms of the contract. In addition, the law itself, independently of the expressed will of the parties, may require that certain facts exist or events happen (such an event being often the substantial performance by the plaintiff of his part of the contract). In such cases, the legal requirement is based upon principles of justice, policy, and right, and not on the expressed will of the parties. All such facts and events, whether expressed in the contract or implied by the law, are *con-*

ditions precedent to the existence of the secondary remedial obligation. The party alleging a breach of contract and asking a remedy must bear the burden of proving the fulfilment of these conditions also.

DISCHARGE, IN GENERAL.

If the plaintiff has established the fulfilment of the two foregoing sets of conditions precedent, has proved the contract and its breach, has shown the existence of a primary and a secondary obligation, the remedy follows as of course unless the defendant can show a discharge. The question of discharge may arise with reference to the primary contractual obligation, or with reference to the secondary remedial obligation, or with reference to both at once. It might seem that the continued existence of the primary obligation at the time of its breach would be a condition precedent to the existence of a secondary obligation, and that the burden of showing such continued existence is on the plaintiff; but the Courts frequently assume the continuing existence of both obligations, throwing on the defendant the burden of proving a discharge of either.

What constitutes a discharge and how should it be alleged? In the first place let us consider certain things that do *not* constitute a discharge. Lack of mutual consent (including mistake), lack of consideration, lack of delivery in case of deeds, illegality, incapacity of parties, fraud, duress, all these affect the *formation* of the contract, either preventing the existence of any *primary* obligation; or making the contract voidable and the obligation imperfect, and giving to the defendant alone the option of avoiding or of enforcing the obligation. A justifiable avoidance where the defendant has this option results in a final discharge of the obligation.

The *statute of frauds* is a defense in some cases, but it never effects a discharge. Certain statutes declare the contract void, if not in writing. These prevent the formation of any primary obligation; they do not discharge anything. All other statutes of frauds merely bar the remedy conditionally, without purporting to discharge either the primary or the secondary obligation. They operate after the fashion of a condition precedent.

The *statute of limitations* is like the statute of frauds in not effecting a discharge. It bars the remedy, but the primary obligation is still regarded as existing in an imperfect form, and may

still become the basis of an action in case of a waiver of the statutory privilege.[2] It is not a discharge, although it acts somewhat in the same way as a condition subsequent. Of course the statute may be so worded as to destroy all obligations whatever.[3] In such case it is a true discharge. After such a discharge, a new promise without new consideration could be enforced only by a frank adoption of the doctrine that a *moral* obligation is a sufficient consideration. That the ordinary statute of limitations is not a discharge is indicated by the fact that the creditor may still enforce his liens and mortgages, if he has any, given to secure performance, even though there is no waiver by the debtor.[4] It seems that any method of enforcing the demand, other than action at law, is open to the creditor. The statute is only a rule of procedure and is not operative outside of the statutory jurisdiction.[5]

Bankruptcy laws very generally provide for an absolute discharge upon the compliance with certain requirements Such a discharge is applicable to either a primary or a secondary obligation. The burden of establishing it is of course on the defendant.

BREACH OF CONTRACT AS A DISCHARGE.

It is frequently stated that *breach of contract* by the plaintiff operates as a discharge of the defendant.[6] However, this seems not to be logically correct, though in some cases it may be *practically* correct. The question can arise only in the case of bilateral contracts, where a promise is given for a promise. If the defendant's promise was offered, not for a return promise, but for an act or performance, the defendant is not bound by any sort of obligation until the plaintiff has acted or foreborne as requested. Both thereafter and theretofore, it is impossible for the plaintiff to commit a breach, because at no time has he made a promise and at no time has he been under an obligation. The obligation of the contract is wholly unilateral.

In bilateral contracts, sometimes the promises are held to be "independent", meaning that the liability of each party for nonperformance of his promise is not dependent upon whether or not

[2] *Ilsley v. Jewett*, 3 Metc., 439; *Way v. Sperry*, 6 Cush., 238; *Dusenbury v. Hoyt*, 53 N. Y., 521.

[3] *Pierce v. Seymour*, 52 Wis., 272.

[4] Wald's Pollock on Contracts, Williston's Ed., 775.

[5] *Ibid.*, 777, 780.

[6] Anson on Contracts, 3d Amer. Ed., by Huffcut, p. 356, *et seq.*

the other party has performed his part. In modern times it is a very exceptional case where the promises will be held to be entirely independent. At an earlier stage the contrary was true.[7] But if promises are independent, breach by one party cannot discharge the other.

Supposing the promises are not independent, does a breach by the plaintiff discharge the defendant? To say that the defendant's promise is dependent means that he will not be liable in an action until certain things promised by the plaintiff have been performed. Performance of these things is a condition precedent to the defendant's liability to suit. In cases of non-performance, the defendant's liability does not accrue. The secondary or remedial obligation never arises, and hence it cannot be *discharged.* In this matter, it makes no difference whether the condition precedent is expressed as such in the contract or is a pure construction of law (a "condition implied by law" so-called); and it makes no difference whether the condition is the performance of a thing promised or the happening of a thing not promised. If it was *not* promised, of course its not happening is no breach of contract on the plaintiff's part. But in all these cases alike, the non-fulfilment of the condition prevents the secondary obligation from arising. It does not discharge it.

But even though the secondary obligation is not discharged, for the reason that it never existed, may it not be said that the non-fulfilment of that which is a condition precedent to the existence of the secondary obligation and to the remedy, operates as a discharge of the *primary* contractual obligation? It is believed not.

Suppose the following bilateral contract: A promises to convey land to B after B shall pay $1,000; and B promises to pay the $1,000 on March 1, if A's title is then perfect. B could not sue A during *February,* because of the non-fulfilment of a condition precedent, although B has committed no breach. A is bound by his primary contractual obligation, but his secondary obligation to pay damages for breach has not accrued. If B should sue A in *April* for not conveying, B not having paid the $1,000, the suit will fail for the same reason as before. But in this latter case, the facts show that B is liable to suit; he has broken his promise.

[7] *Nichols v. Raynbred,* Hobart, 88; *Pordage v. Cole,* 1 Wms. Saunders, 319. For modern cases see *Norrington v. Wright,* 115 U. S., 188; *Rugg v. Moore,* 110 Pa., 236; *Beecher v. Conradt,* 3 Kernan, 108.

It does not follow from this that A is discharged from his primary obligation. The only *express* condition precedent to A's liability to action was *payment* by B, *not payment on March 1.* Hence, in case the law should not "imply" payment on March 1 as a condition, as it might well not do,[8] B could pay later and still hold A to his promise. In any case, B's breach would operate to give A a right to sue him, but not to discharge A.

If we should suppose that payment on March 1 by B was a condition precedent to A's liability, and that the money was not paid, still A is not discharged. His primary obligation has merely become voidable at his option (as in case of fraud, except that for reasons of policy the burden of proof is different). He may waive the condition and hold B, in which case he remains bound himself. Or he may refuse to waive it and avoid the contract. It is A's avoidance that discharges, and not merely B's breach. But A may "stand pat", merely taking no action whatever, waiving nothing and avoiding nothing. In such case B could never maintain suit on A's promise and as a *practical* matter A may be said to be discharged, although theoretically and logically he is not.

IMPOSSIBILITY OF PERFORMANCE.

There are various sorts of impossibility. It may exist prior to the formation of the agreement, or it may arise subsequently. It may be legal impossibility or physical impossibility. The thing that is impossible may be the performance of the defendant's obligation itself, or the fulfilment of a condition precedent to the defendant's liability, or the fulfilment of a condition subsequent; the impossibility of any other thing is immaterial in determining legal liability.

If the defendant makes a promise that is at that time legally or physically impossible of fulfilment, no legal obligation arises. Legal and physical possibility is a condition precedent to the birth of the primary obligation. Of course mere difficulty is not impossibility; but impossibility must be determined by practical standards in the light of the present state of knowledge and invention. If a man promises to dig a well yesterday, or to build a house on the sun, or to make a road to China on a straight line, no obligation is born. Such an impossibility is therefore not a discharge.

[8] See *Constable v. Cloberie,* (1626) Palmer, 397; *Freeth v. Burr,* L. R. 9 C. P., 208; *Mersey Steel & Iron Co. v. Naylor,* (1884) 9 App. Cas., 434.

In case the impossibility arises subsequently to the making of the agreement, and by no fault of the defendant, it has been said that the defendant is not excused.[9] There are so many exceptions to this rule, that it is believed that the rule is itself incorrect. In the cases laying down such a rule, the performance of the defendant's promise was not totally impossible, but had become merely more difficult or more expensive to perform or would require a longer time than agreed upon. Such greater difficulty or expense is very generally held to be no discharge.[10] But where the performance of the defendant's promise has become legally impossible,[11] or physically impossible, it is believed to be correct to say that the defendant has the option of regarding himself as under no liability. It is to be noted that it is only the primary obligation that is impossible of performance. The performance of the secondary obligation, payment of damages, never becomes impossible. And the question is whether the impossibility of performing the primary obligation prevents the accrual of any secondary obligation. The correct rule seems to be that the continued possibility of performance for a reasonable period is a condition precedent to the defendant's liability, even though the parties have used no express words to that effect. Impossibility does not discharge the primary obligation, although it prevents its performance; nor does it discharge the secondary obligation to pay damages, but it prevents it from being born unless the defendant chooses to waive it. So, it has many times been held that where the continued existence of some specific thing is necessary to the performance of the contract, the destruction of that thing prevents any liability in damages.[12] It has even been held that the defendant is not liable where his failure to perform was due to the existence of a contagious disease making performance dangerous to life,[13] or was due to a great and unexpected shortage

[9] See *Paradine v. Jane,* (1648) Aleyn, 26, and cases following its dictum.

[10] *Stees v. Leonard,* 20 Minn., 494; *School Dist. v. Dauchy,* 25 Conn., 530; *Dermott v. Jones,* 2 Wall, 1; *Ward v. Hudson R. Bldg. Co.,* 125 N. Y., 230. The rule in Roman Law seems to have been the same. Dig. 45, 1, de v. o. 137, Sec. 4-6.

[11] *Baily v. De Crespigny,* L. R. 4 Q. B., 180; *Jones v. Judd,* 4 N. Y., 412.

[12] *Taylor v. Caldwell,* 3 B. & S., 826; *Howell v. Coupland,* L. R. 9 Q. B., 462; *Butterfield v. Byron,* 153 Mass., 517.

[13] *Lakemen v. Pollard,* 43 Me., 463.

of water in a stream by which logs were to be transported.[14] These last cases must be regarded as contrary to the weight of authority or as rare exceptions.

If possibility of performance is a condition precedent to the defendant's liability, the burden of proving such possibility is on the plaintiff. But the law will assume that performance is possible, and the defendant must undertake the first step toward showing impossibility of performance unless the plaintiff's own allegations show that the defendant's promise is impossible to perform.

The impossibility instead of concerning the defendant's promise, may concern the fulfilment of a condition precedent to the defendant's liability or a condition subsequent to his liability. The impossibility of anything that is of too little importance to be a condition of the existence of the defendant's liability cannot affect that liability at all. If a condition precedent becomes impossible of fulfilment, the defendant's secondary obligation never arises, his liability never accrues. He is not discharged, for here, as in other cases, he may waive the condition if he likes, and perform his promise or pay damages for non-performance. Suppose a promise to pay $100 after X shall go to the moon. No primary obligation arises, for from the very beginning, the condition is impossible of fulfilment.[15] But suppose a promise by A to pay $100 after X shall paint A's house; the primary obligation of A is formed; but if the house is burned before X paints it, A cannot be sued. But as shown above[16] this is logically no discharge.

It is stated in Wald's *Pollock on Contracts*[17] that upon the happening of such impossibility "the contract becomes void, not merely voidable at the option of the party disabled", citing the

[14] *Clarksville Land Co. v. Harriman,* 68 N. H., 374.

[15] The suggestion in *Worsley v. Wood,* 6 T. R., 710, that "if there be a condition precedent to do an impossible thing, the obligation becomes single" cannot be accepted, if by "single" Lord Kenyon meant *unconditional.* The Roman law and the codes derived therefrom agree with the text above. Gaius, III Inst. 98; Code Civil Art 900; Audinet in Revue de Droit International Privé for 1909, Nos. 3 and 4, 474; Erskine's Principles of the Law of Scotland, Ed. 20, p. 394; Kerr's Handbook of Mex. Law, p. 46; Code of Mex., Arts. 1328-1354. The Sabinians and the Proculians differed as to whether this rule applied to conditional bequests.

[16] Pp. 517-519.

[17] Williston's Ed., p. 545.

case of *Poussard v. Spiers.*[18] This is logically wrong, and the case cited does not sustain it. An opera singer became ill and was unable to attend rehearsals or to appear during the first week of public performances. It was held that her appearance for rehearsals and during the opening week was so important that it was a condition precedent to the manager's liability on the contract, and that the manager was justified in getting a permanent substitute. Here a constructive condition precedent became impossible of performance and was not performed. Of course, the manager's secondary obligation would not arise in the absence of a waiver of the condition. But the contract did not become *void*. It was not discharged. The manager had an option. He might still have required the singer to perform for the remaining weeks. He was not discharged until he exercised his option. Neither was the singer discharged, though no doubt the impossibility of performing her promise would prevent her liability to pay damages from arising.

Conditions subsequent are defined below as discharging an already existing obligation. If such a condition becomes impossible of fulfilment, of course the obligation to which it was subsequent is not discharged but remains enforcible.[19]

It appears, therefore, that in no case is impossibility a true discharge of contract; but antecedent possibility is a condition precedent to the existence of a primary obligation, and continuing subsequent possibility is a condition precedent to the existence of a secondary obligation.

CONDITIONS SUBSEQUENT.

An obligation, either primary or secondary, may be discharged by the happening of a *condition subsequent.* A condition *precedent* has to do with the *birth* of an obligation, primary or secondary. A condition *subsequent* has to do with an obligation's continued life after birth. When the condition subsequent is fulfilled, the obligation dies. It might, therefore, be said that any fact or event that kills a pre-existing obligation is a condition

[18] (1876) 1 Q. B. D., 410.

[19] In *Semmes v. Hartford Ins. Co.,* 13 Wall., 158, the fulfilment of the condition subsequent did not become impossible; instead, it became legally impossible not to fulfil it. The Court set it aside, on principles of justice, so as to prevent the insurance company from being discharged and to prevent the plaintiff from suffering a heavy forfeiture.

subsequent. Such a broad usage of the term is not customary. It would make every form of discharge fall within the term. Usage does not permit us to call a novation or a merger or an alteration a condition subsequent. According to the best usage, a condition subsequent in the law of contracts is a fact or event which the contract provides shall discharge one from his obligation (either primary or secondary) after it has accrued.

The word *subsequent* is a word expressing *relation in time*. It means that one thing occurs after another has occurred. In the law of contracts, a condition subsequent may be a fact or event occurring after the formation of a *primary* obligation, and putting an end to it; or it may be one occurring after the accrual of a *secondary* obligation, putting an end to that. An event putting an end to the secondary obligation will generally end the primary obligation also, though it does not have to do so. An event putting an end to the primary obligation before the accrual of a secondary obligation will prevent any secondary obligation from arising.

The fact or event that constitutes the condition may be the non-performance of a promise or it may be a thing concerning which no promise has been made. Suppose a promise by A to convey land to B after payment of $1,000 by B, and a return promise by B to pay $1,000 on March 1, it being further expressly provided that A's obligation shall cease if the money is not paid on March 1. Here, non-payment by B on March 1, is a breach of promise by B, but it is also a discharge of A from his primary obligation. It is an express condition subsequent to that primary obligation, terminating its life. It is not subsequent to any secondary obligation. Its fulfilment prevents such a secondary obligation on A's part from arising. In this case it is not B's breach of promise as such that discharges A. B's failure to perform discharges A's primary obligation because the creators of that obligation expressly empowered it to live only until a certain event. The obligation would have expired by this limitation and for the very same reason, even if B had made no promise to pay on March 1. The ordinary option to purchase is a perfect example of this. The holder of the option does not promise to buy, but the owner is under a primary obligation until a certain date when it will be discharged. In such case, it *cannot* be a discharge by breach. The failure to buy is no breach, but it is a condition subsequent and a discharge.

BURDEN OF PROVING CONDITION SUBSEQUENT.

In a certain case,[20] a company issued an insurance policy, promising to pay a named sum in case of loss by fire. It was further provided that any suit on the policy must be brought within one year after the occurrence of the loss, the liability of the company after such period to end and determine. Here, the failure to bring suit within a year is an express condition subsequent. It is subsequent to both the primary and the secondary obligations, and upon its fulfilment they both die. In this case, the primary obligation was born upon the execution of the policy. But the insured's right to immediate payment did not accrue until after the fire. Not until then did the defendant's secondary obligation exist. No doubt there were several conditions precedent to the accrual of such secondary obligation, but the starting of a suit was not one of them. In all cases, as stated heretofore, the secondary obligation must exist before a right to sue can exist; the suit cannot be itself a condition precedent to the right to sue. The company's breach occurs before any suit is begun; its secondary obligation *to pay at once* arose after the fire, but before the bringing of a suit.

The burden of proving such a condition subsequent, just as in case of any other discharge, is upon the *defendant.* The plaintiff made out a cause of action when he alleged the execution of the policy (the primary obligation) and the breach by the defendant, which includes an allegation of the fulfilment of all conditions precedent to the secondary obligation. The birth of such a cause of action having been shown by the plaintiff, it is reasonable to assume its continued existence and the law makes such an assumption. The plaintiff must prove the birth of a right of action; let the defendant prove its death. In the physical world, if a body is set in motion it will continue at the same speed and in the same direction, inevitably and forever, until some outside power affirmatively intervenes. So also if a body is at rest, it will remain at rest. Let him who alleges an affirmative intervention prove it. The rule in the physical world may well be the rule in the legal world. It appeals to the normal sense of fairness. Pragmatically speaking, it is a rule that *works,* and gives satisfaction.

[20] *Semmes v. Hartford Ins. Co.,* 13 Wall., 158.

In another case[21] the defendant signed a promissory note for a sum of money with a proviso that the note should be null and void if a greater amount of oil should arrive in New Bedford prior to October 1 than had arrived the preceding year. Here the Court held that the defendant must bear the burden of proving that the greater amount of oil arrived. This appears to be erroneous. The Court called the condition a *condition subsequent,* and in fact it was subsequent to the creation of the primary obligation, and it provided for the subsequent death of such obligation. It may properly be said that the law will assume the continued existence of the primary obligation, and that the defendant must affirmatively prove any interruption. But even so, this would not authorize a judgment for plaintiff on the note. He has no right of action, however much we assume the continuance of the primary obligation. He must also show that the secondary obligation has been born. Until he shows this, the defendant may stand pat and prove nothing. The plaintiff's right to immediate payment of the note could not arise until the determination of the amount of oil that arrived, and even then it would not arise unless the smaller amount of oil had arrived. On October 1 either the oil has arrived or it has not. The defendant is not liable to suit prior to October 1; and if the greater amount of oil has arrived by that time, he is not liable afterwards either. But the plaintiff must show that a liability to suit was born. For the law to relieve the plaintiff of this burden, it must assume, without proof, the *birth* of the secondary obligation and not merely its continued existence after birth. This, of course, the law may do, but it is believed to be inconsistent and illogical. Carried to its logical conclusion, it would permit a plaintiff to rest his case after proving nothing but the *formation* of the contract, the birth of the *primary* obligation.

In another case[22] an insurance company issued a policy in which it was provided that the policy should be null and void if the house insured should burn while unoccupied. The Court held that the burden of proving the non-occupancy of the house was on the defendant company. This, too, seems erroneous. The burning while *unoccupied* is indeed a condition subsequent to the birth of the primary obligation; but the burning while *occupied*

[21] *Gray v. Gardner,* 17 Mass., 188.

[22] *Moody v. Insurance Co.,* 52 Ohio St., 12.

is a condition *precedent* to the existence of any secondary obligation, to any liability on the company, to any right of action.

Of course, the logical character of the condition does not *necessarily* determine the burden of proof. It is perfectly proper to throw the burden upon any one who alleges crime or fraud, or upon the one having peculiar knowledge of the facts to be proved, or upon one who has agreed to assume it. In the insurance case above, the insured should have borne the burden of proof for the additional reason that the fact as to occupancy was within his own knowledge, while the insurance company might be unable to secure evidence on the point. In the absence of some particular reason to the contrary, the burden of proving the fulfilment of a condition precedent to the *secondary* obligation of the defendant should be on the plaintiff, even though it be *subsequent* to the *primary* obligation of the defendant. But the burden of proving any *discharge* of such *secondary* obligation, and this a true condition subsequent is, should be on the defendant.

It seems that a condition subsequent differs from a condition precedent also in this; it will never be *implied* by the law but must always be expressed by the parties A condition implied by the law is a pure construction of law, without reference to the intention of the parties. Such a condition is constructed only when necessary to do justice and maintain right against wrong. To attain this object it is *never* necessary to "imply" a condition subsequent or to *discharge* one from his obligation. It is always sufficient for his protection to give him an *option,* to construct a condition precedent to his liability, one that he may waive if he desires. Such a condition prevents the birth of the secondary obligation, but does not totally discharge.

The case of a surety bond may be thought to be an exception to the foregoing rules, but logically it is not. It may well be that here, just as in the oil case,[23] and the insurance case[24] stated above, the Courts throw the burden of proving the fulfilment of the condition on the defendant, calling it a condition subsequent, when logically it is not one. Such a holding may be justified in many cases; in others perhaps it should be disapproved. The contract may show that the parties intended the burden to be on the defendant. If so, it is immaterial what the logical character of the

[23] *Gray v. Gardner,* 17 Mass., 188.

[24] *Moody v. Insurance Co.,* 52 Ohio St., 12.

condition is. In some cases, the condition may be a true condition subsequent. For example, suppose that A executes a bond to B in such form as to make the amount a debt *immediately payable,* but with a proviso that the liability should cease on the happening of a certain event. Here the primary and the secondary obligations both exist at once, the condition is a true condition subsequent, and the burden of proving its fulfilment is on the defendant. It is submitted, however, that the above is seldom in accordance with the intention of the parties to a surety bond. Such bonds are not intended to create a debt immediately payable, but to create a debt upon non-fulfilment of a condition. Thus, a bond for a fixed amount given to secure performance of certain duties by an officer is in reality a promise to pay the damages caused by such officer's breach of duty, up to but not exceeding the amount of the bond. Even though the bond is in such form that the action of debt would have lain at common law for the penal sum, without averring a non-performance by the officer, equity would not permit such a suit and ought to require the plaintiff to allege and prove the amount of his loss. The breach of duty by the officer is in reality a condition precedent to a right of action against the surety.[25]

DISCHARGE BY AGREEMENT.[26]

A condition subsequent is a mode of discharge provided for in the original contract itself. A discharge may also be effected by a subsequent agreement. This subsequent agreement may take the form of a *release under seal,* a *mutual rescission,* or a *substituted contract.* The sealed release is effective to discharge any sort of a contract, and requires no consideration. The defendant needs allege and prove only its execution and delivery. A mutual rescission is effective only in the case of a bilateral contract that has not been fully performed by either party. A consideration is required for a release or a rescission not under seal. If either party to a bilateral contract has fully performed his part, he has nothing to gain by a rescission and the other party has nothing to lose. A substituted agreement is a mutual rescission with the addition that one or more new obligations are substituted for the

[25] See Wald's Pollock on Contracts, Williston's Ed., 356, 555.

[26] The remaining topics discussed in this article are very fully treated by Professor Williston in his edition of Wald's Pollock on Contracts, Chap. XIV. The treatment of them here will be brief, with emphasis on a few special points only.

old. But the rescission and the substitution are interwoven into one body and one breath, neither one having power of separate existence. In pleading such a discharge, the defendant must allege the very same things that must be alleged by a plaintiff who sues upon a contract, except that he does not have to show a breach. The defendant is not seking a *remedy* and hence he does not have to establish the existence of any secondary obligation. He must allege merely the agreement, showing that it includes a rescission of the former obligation. No technical language is required. The facts must be so stated that the Court can determine whether or not there was an agreement and what were its terms. It need not be expressly stated that the first obligation was discharged, and indeed such an allegation would be unavailing if the proper interpretation of the facts shows that a rescission was no part of the new agreement and that therefore it was not "substituted". If the facts as stated are inconsistent with the continued life of the former obligation, the plea is sufficient. A novation is one form of such a substituted agreement.

Some problems arise in connection with the statute of frauds and with contracts under seal, but they will be passed by in this article. A covenant never to sue upon an obligation has been given the effect of a discharge to prevent circuity of action.[27]

DISCHARGE BY PERFORMANCE.

The *specific performance* of an obligation discharges it, whether the obligation is primary or secondary. A discharge may also be effected by a *substituted performance* if it is accepted as such. Such a substituted performance and the agreement inducing it are called an *accord and satisfaction.* The accord is the agreement; the satisfaction results from the performance. The term accord and satisfaction seems to be restricted in its use to those cases where a right of action has accrued, and it is then applied whether that right arose out of contract or in tort. It is applied only as a mode of discharging a secondary obligation. Yet there is no logical reason why the term should not be applicable to a discharge of contract before breach, to a discharge of the primary obligation. It is entirely competent for two parties to agree that a certain substituted performance shall be given in discharge of a contract, the time for the performance of which has not yet arrived. In such case, there is no *substituted contract.* It is a

[27] See *Ford v. Beech,* 11 Q. B., 852.

substituted *performance* and until such performance is had, the original obligation remains in force.

Of course, the parties may agree that their new contract shall itself, prior to its performance, put an end to the previous obligation. This is called a substituted agreement, and has been dealt with above. Such a new agreement may be substituted for a previous primary obligation or a previous secondary obligation, according as it is made before breach or after breach of the previous contract. If it is made after such breach, it is sometimes called an accord; but it should not be so called. An accord is a bilateral agreement for a substituted performance. If the new executory agreement is itself substituted, after breach of the previous contract, it is a substituted agreement and an instant discharge; it substitutes a new primary contractual obligation for the previous secondary obligation.

"Accord" is the name for an agreement that is not substituted. In itself, it discharges nothing. This fact led to the erroneous idea that "upon an accord no remedy lies", that an accord is an unenforcible agreement. Notwithstanding early dicta and decisions,[28] there is no doubt that an accord is an enforcible contract if it fulfils the ordinary requirements of other contracts.[29] It should be noted that an offer by the obligee to receive a substituted performance, with no promise by the obligor to perform it, is no accord, and of course upon it no remedy lies. The same is true of an offered promise of a substituted performance by the obligor with no promise by the obligee to accept it. These are not agreements. but are mere offers.

It may be doubted whether an accord should not be held to suspend temporarily the right of action on the prior obligation. No Court with equitable jurisdiction would be embarrassed by the old rule that the temporary suspension of a right of action destroyed it forever.[30] Even Courts of Common Law have not been embarrassed by it in cases where the accord was a composition with creditors,[31] or was a new negotiable note taken in conditional payment.[32] However this may be, the accord is no dis-

[28] *Lynn v. Bruce,* 2 H. Bl., 317; *Allen v. Harris,* 1 Ld. Raym., 122.

[29] *Nash v. Armstrong,* 10 C. B. N. S., 259; *Hunt v. Brown,* 146 Mass., 253.

[30] See *Ayloffe v. Scrimpshire,* 2 Salk., 573.

[31] *Good v. Cheesman,* 2 B. & Adol., 328; *Newington v. Levy,* L. R. 5 C. P., 607; 6 C. P., 180.

[32] See *Slater v. Jones,* L. R. 8 Exch., 186.

charge of the previous obligation. It is the performance of the accord that results in satisfaction.

It was once supposed that the primary obligation of a contract under seal could not be discharged by accord and satisfaction, but that the secondary obligation to pay damages for breach of such a contract could be so discharged.[33] This distinction, based upon the superstitious reverence for a seal, is long since dead.

ALTERATION, MERGER, ARBITRATION AND AWARD, SURRENDER AND CANCELLATION.

The remaining forms of discharge will be given only passing mention. A written obligation is discharged by a material alteration made by the obligee for a fraudulent purpose. Alterations by a stranger, accidental alterations, and immaterial alterations do not affect the obligation as the law is at present in the United States.

"Where an obligation arising under a contract is reduced to judgment, or where an obligation arising under a simple contract is put in the form of a specialty, the original obligation is by operation of law extinguished and merged in the new obligation."[34]

An arbitration and award has much the same effect as a judgment. The award is conclusive on the parties, and if the award has changed the character of the defendant's duty, his original obligation is discharged, and suit lies on the award alone. But if the award purports merely to determine the amount of the contractual obligation, suit lies in form upon such obligation, recovery being limited by the award.

The obligation of any formal document, such as sealed contracts and negotiable instruments, can be discharged by voluntary surrender or cancellation of the document. Such action is somewhat in the nature of an executed gift, the document itself being the obligation. Where there is no instrument that can itself be regarded as the obligation, there is great difficulty in proving the execution of a gift, for the obligation itself cannot be physically delivered. But the surrender or cancellation of evidential documents may even in these latter cases prevent proof of the obligation, or may be given as evidence of a mutual rescission.

Arthur L. Corbin.

Yale Law School.

[33] *Blake's Case,* 6 Coke, 43 b.

[34] Williston, in his edition of Wald's Pollock on Contracts, 874.